

NO. PD-1234-20

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
4/9/2021
DEANA WILLIAMSON, CLERK

MARIO ERNESTO MARTELL

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-18-00180-CR**

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Hon. Diane R. Navarette, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Jeff
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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Mario Ernesto Martell, was indicted for the third-degree-felony offense of possession of marijuana in an amount of 50 pounds or less but more than 5 pounds. (CR at 7).¹ On October 6, 1999, Martell entered a negotiated plea of guilty, and pursuant to the plea agreement, the trial court deferred adjudication and placed Martell on community supervision for a period of 4 years. (Supp. CR at 5-12 – the docket sheet and plea papers); (CR at 19-24).

On March 4, 2002, within the original period of community supervision, the State filed a motion to adjudicate Martell's guilt. (CR at 28-35). After a contested adjudication hearing conducted over three days in 2018, the trial court adjudicated Martell guilty of the possession-of-marijuana charge and placed him on "straight" probation for 10 years. (RR5 at 8-11); (CR at 73-74). Martell timely filed notice of appeal from this adjudication. (CR at 79, 94).

On November 20, 2020, in a published opinion, the Eighth Court of Appeals reversed the trial court's judgment adjudicating Martell's guilt and remanded the case to the trial court with instructions to dismiss the motion to adjudicate. *See*

¹ Throughout this brief, references to the appellate record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the supplemental clerk's record will be made as "Supp. CR" and page number, and references to the reporter's record will be made as "RR" and volume and page number.

Martell v. State, 615 S.W.3d 269, 277 (Tex.App.–El Paso 2020, pet. granted). No motion for rehearing was filed.

The State timely submitted its petition for discretionary review (PDR) for filing on December 21, 2020, and it was accepted for filing on December 28, 2020. This Court granted the State’s PDR on March 10, 2021, with the notation that oral argument will not be permitted.

GROUND FOR REVIEW

After holding that the evidence was legally and factually insufficient to support the trial court's rejection of the defendant's due-diligence affirmative defense, the Court of Appeals erred in failing to further address the issue of estoppel, even though the State raised the estoppel issue in the trial court, the trial court relied on the estoppel issue in proceeding to adjudicate the defendant's guilt, and the State again raised the estoppel issue in the Court of Appeals.

STATEMENT OF FACTS

The issue before this Court is whether the Court of Appeals improperly failed to address the question of whether Martell is estopped from relying on the statutory requirement of an attempt at in-person contact, as set out in the statutory due-diligence affirmative defense to revocation of deferred-adjudication community supervision, because he affirmatively requested that the trial court allow him to reside and work in Juarez, Mexico, and then voluntarily accepted the benefit of this requested condition of his community supervision, a benefit and condition that allowed him to remain beyond the physical and territorial reach of local law-enforcement authorities and therefore effectively rendered subsequent compliance with the attempt-at-in-person-contact requirement legally and factually impossible. The facts relevant to this issue are accurately set out in the Court of Appeals' opinion, *see Martell v. State*, 615 S.W.3d at 270-72, as detailed below.

Martell's community supervision

When Martell was initially placed on deferred-adjudication community supervision on October 6, 1999, the trial court granted his request and expressly permitted him to reside and work at a specific address in Juarez, Mexico, during the period of his supervision. (CR at 22-24 – term and condition h.(2) of Martell's community supervision); *Martell v. State*, 615 S.W.3d at 271. However, he was

still required to report to his probation officer in El Paso once a month. (CR at 22-24 – term and condition d.(1) of Martell’s community supervision); *Martell v. State*, 615 S.W.3d at 271.

After only a couple of months, Martell stopped reporting to his probation officer in El Paso as required, and on March 4, 2002, the State filed its motion to adjudicate Martell’s guilt, alleging—among other things—that Martell had failed to report to his probation officer as required during the months of December of 1999 through December of 2001. (CR at 28-35); *Martell v. State*, 615 S.W.3d at 271. A capias for Martell’s arrest to answer to the motion to adjudicate was issued that same date (March 4, 2002), but Martell was not thereafter arrested until August 11, 2017. (CR at 53-54); *Martell v. State*, 615 S.W.3d at 271.

The adjudication proceedings

At the contested revocation/adjudication hearing on January 26, 2018, Adrian Aguirre, a court-liaison officer with the probation department, testified that Martell was placed on probation on October 6, 1999, and that after he stopped reporting, he was considered to be an absconder. (RR3 at 6-7); *Martell v. State*, 615 S.W.3d at 271. Aguirre testified that Martell’s file indicated that after Martell failed to report in December of 1999, the department “did their follow-up” and sent a letter to his (Martell’s) address in Juarez, and when Martell again failed to

report in January of 2000, the department sent a second letter to his (Martell's) Juarez address. (RR3 at 8-9); *Martell v. State*, 615 S.W.3d at 271. And after sending this second letter, the department also tried to contact Martell by telephone on February 15, 2000, calling the number Martell had provided, but this attempt was unsuccessful. (RR3 at 9-13); *Martell v. State*, 615 S.W.3d at 271.² After these unsuccessful attempts to locate Martell, the probation department obtained, on October 9, 2000, a bench warrant for Martell's arrest for failing to report, and they further began submitting violation notices to the District Attorney's Office so that the State could file a motion to revoke Martell's community supervision. (RR3 at 13); *Martell v. State*, 615 S.W.3d at 271.

Upon further questioning by the trial court, Aguirre testified that Martell's file indicated that he both resided and worked in Juarez, and he (Aguirre) agreed with the court that Martell's probation officer "would not be able to go to Juarez to do any home visits or anything like that." (RR3 at 21-22); *Martell v. State*, 615 S.W.3d at 272.

In her argument to the court, the prosecutor recognized the due-diligence affirmative defense codified in the Texas Code of Criminal Procedure. (RR3 at

² Aguirre testified that Martell's file indicated that this call was answered by someone named "Maribel," who claimed to be a "friend of the family," and the probation officer assigned to Martell's case was unable to speak to him. (RR3 at 13); *Martell v. State*, 615 S.W.3d at 271.

23).³ The prosecutor argued, however, that because Martell was allowed to reside and work in Mexico, neither the probation department nor any other local law-enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address in Mexico. (RR3 at 23-25). She further argued that the record showed that the authorities did attempt to make contact with Martell after he stopped reporting by sending letters to his listed address and calling his listed telephone number. (RR3 at 24). In closing, the prosecutor argued that because Martell was allowed to reside and work in Mexico, he should not get the benefit of remaining in that foreign country, beyond the reach and jurisdiction of the local probation and law-enforcement authorities. (RR3 at 29-30); *Martell v. State*, 615 S.W.3d at 272.

In taking the due-diligence issue under advisement, the trial court noted that this case was different than most cases, in that no officer could go into Mexico to contact Martell, such that it was legally impossible to try to make personal contact with Martell in Mexico. (RR3 at 34-35).

The trial court reconvened the case on May 31, 2018, indicated that it had

³ See TEX. CODE CRIM. PROC. art. 42A.109 (providing that it is an affirmative defense to revocation/adjudication based on a failure to report that no supervision officer, peace officer, or other officer with the power to arrest under a warrant issued for that alleged violation contacted or attempted to contact the defendant in person at the defendant's last-known residence address or employment address, as reflected in the files of the local probation department).

considered the parties' arguments and reviewed the caselaw on the due-diligence issue, and rejected Martell's defense and found the failure-to-report allegations in the motion to adjudicate to be true:

[The Court]: ...We had had a contested revo and there had been evidence, I guess, presented. And then what had happened is that both sides submitted – I guess the whole issue was on whether Mr. Martell had received – there had been efforts from the probation department to reassert supervision and whether he had been contacted.

* * *

[The Court]: All right. And then so I was provided with case law. I don't think – I don't think I signed an order. So I want to make sure that I put it on the record that I did consider the arguments on the due diligence. And that in chambers, I did tell both sides that the fact that Mr. Martell had been given permission to reside in Mexico, that I didn't feel that it was in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.

So at that point, I asked that this hearing be set so that then I could – we can determine, I guess, how we were going to move forward with the case.

So I did find that the allegations in the motion to adjudicate guilt were true, that he didn't report during that – this period of time in violation of his probation. So now, we need to go forward on, I guess, what we do after this.

(RR4 at 5); *Martell v. State*, 615 S.W.3d at 272. Thereafter, the court heard evidence and arguments on the issue of sentencing and took the sentencing issue under advisement. (RR4 at 6-35). Some 3½ months later, on September 12, 2018, the trial court formally adjudicated Martell's guilt, sentenced him to 10-years' confinement, and probated the sentence and placed him on 10-years' "straight"

probation. (RR5 at 8-11); (CR at 73-74); *Martell v. State*, 615 S.W.3d at 272.

The Court of Appeals

The Eighth Court of Appeals reversed the trial court's judgment adjudicating Martell's guilt. Specifically, the Court of Appeals held that the evidence was legally insufficient to support the trial court's rejection of Martell's due-diligence affirmative defense because the evidence showed that no attempts were made to contact Martell in person at his listed and last-known residence or work address in Mexico, as required by article 42A.109 of the Texas Code of Criminal Procedure. *See Martell v. State*, 615 S.W.3d at 276-77. In reaching this conclusion, the Court of Appeals held that the courts had no power to legislate, disregard statutory provisions, or create exceptions to statutes. *See id.* at 275, *citing State v. Ross*, 953 S.W.2d 748, 751 n. 4 (Tex.Crim.App. 1997).

Consequently, because the record failed to show any attempts by a probation officer or any other law-enforcement officer to make in-person contact with Martell at his listed addresses of residence and employment (both of which were in Juarez, Mexico), the Court of Appeals held it was required to follow the plain dictates of the statutory due-diligence affirmative defense, and Martell had therefore satisfied his burden of proving the due-diligence affirmative defense. *See Martell v. State*, 615 S.W.3d at 276; TEX. CODE CRIM. PROC. art. 42A.109.

SUMMARY OF THE STATE'S ARGUMENT

The State advanced two alternative arguments in the Court of Appeals. First, the State argued that, due to the particular circumstances of this case, the Court of Appeals should, in effect, create and apply a judicial exception to the legislatively mandated attempt-at-in-person-contact requirement of article 42A.109 and affirm the trial court's judgment on that basis. And in its opinion, as discussed above, the Court of Appeals expressly rejected this argument.

However, the State advanced a second basis for affirming the trial court's judgment based on a theory of equitable estoppel. Specifically, the State argued that the trial court had correctly ruled that because Martell requested and received the benefit of being able to reside and work in Mexico, he should be estopped from then turning around and using that benefit as a sword (or shield) against subsequent revocation/adjudication of his deferred-adjudication community supervision. This equitable theory of estoppel is wholly separate and distinct from the argument that the Court of Appeals should create and apply a judicial exception to article 42A.109. Simply, application of the theory of estoppel in this case would not, and does not, act as an exception to the statutory requirements of article 42A.109; rather, it merely precludes Martell from relying on those statutory requirements after requesting and receiving the benefit of being allowed to reside

and work in Mexico, beyond the physical and territorial reach of local law-enforcement authorities.

Because the Court of Appeals addressed and rejected only one of the State's two alternative arguments in support of affirming the trial court's ruling, the Court erred and failed to comply with rule 47.1, which requires the Court to address every issue raised therein that is necessary to final disposition of the appeal. This Court should therefore vacate the judgment of the Court of Appeals and remand the case to the Court of Appeals to address the applicability *vel non* of the equitable estoppel issue.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW: After holding that the evidence was legally and factually insufficient to support the trial court's rejection of the defendant's due-diligence affirmative defense, the Court of Appeals erred in failing to further address the issue of estoppel, even though the State raised the estoppel issue in the trial court, the trial court relied on the estoppel issue in proceeding to adjudicate the defendant's guilt, and the State again raised the estoppel issue in the Court of Appeals.

I. The trial court relied on a theory of estoppel in proceeding to adjudicate Martell's guilt.

While neither the State nor the trial court expressly used the term "estoppel" during the revocation/adjudication proceedings, the record clearly shows that the prosecutor argued that Martell should be estopped from successfully asserting a due-diligence defense because he was allowed to live and work in Mexico, beyond the jurisdictional reach of local probation and law-enforcement authorities. (RR3 at 23-25 – where the prosecutor argued that because Martell was allowed to reside and work in Mexico, neither the probation department nor any other local law-enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address in Mexico). And the record further shows that in proceeding to adjudicate Martell's guilt, the trial court likewise based its rejection of Martell's asserted due-diligence affirmative defense on equitable notions of estoppel, ruling that Martell should not

get to accept the benefit of being allowed to live in Mexico while at the same time using that benefit to shield himself from later revocation/adjudication: “...the fact that Mr. Martell had been given permission to reside in Mexico, that I didn’t feel that it was in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.” (RR4 at 5).

II. The State again raised and argued the issue of estoppel in the Court of Appeals.

In its brief in the Court of Appeals, the State, after arguing that strict compliance with the requirement in article 42A.109 of an attempt at “in-person” contact with the defendant at his last-known address should not be required under the particular circumstances of this case, namely, the legal and factual impossibility of such compliance because no local probation or law-enforcement officer had the jurisdictional authority to enter Mexico to attempt to contact Martell in person at his listed and last-known address, the State again raised and argued the equitable theory of estoppel. Specifically, the State argued that Martell should not be allowed to rely on the benefit he received from the trial court in being allowed to reside and work in Mexico as a shield against subsequent revocation/adjudication of his deferred-adjudication community supervision:

In this case, Martell was given a huge benefit when, at the time he was initially placed on deferred-adjudication community supervision, the trial court granted him permission to live and work in Mexico as he requested, conditioned on his agreement to report to his probation officer here in El Paso on a monthly basis. And to now hold that the State failed to exercise due diligence in attempting to make in-person contact with him, after Martell breached his agreement to report and instead intentionally remained in Mexico beyond the jurisdictional reach of the probation department and other local law-enforcement agencies, would have the effect of judicially sanctioning such evasive efforts by other probationers similarly granted permission to reside and work in Mexico. As the trial court appropriately recognized, this would not serve the interest of justice.

See (State's brief in the Court of Appeals, at p. 26).

III. The Court of Appeals did not address the estoppel issue in its opinion, even though the issue was raised and was necessary to final disposition of the appeal.

Rule 47.1 of the Texas Rules of Appellate Procedure demands that a court of appeals address in its written opinion every issue raised and necessary to final disposition of the appeal. *See* TEX. R. APP. P. 47.1; *State v. Bernard*, 512 S.W.3d 351, 352 (Tex.Crim.App. 2017). But in its opinion in this case, the Court of Appeals did not in any way address the estoppel issue, even though, as shown above in the discussion of the underlying proceedings: (1) the State argued the theory of estoppel in the trial court; (2) the trial court relied on the theory of estoppel in rejecting Martell's asserted due-diligence affirmative defense and proceeding to adjudicate guilt; and (3) the State raised and argued that same theory

of estoppel in the Court of Appeals. The question, then, is whether the estoppel issue constitutes an issue necessary to final disposition of this appeal, such that it should have been addressed by the Court of Appeals.

In its opinion, the Court of Appeals held that Martell had satisfied his burden of proving the due-diligence affirmative defense because the evidence showed that no probation or law-enforcement officer ever attempted to contact him in person at his listed residence or employment address in Mexico. *See Martell v. State*, 615 S.W.3d at 276. In so holding, the Court of Appeals expressly rejected the State's argument that strict compliance with article 42A.109 was not, and should not be, required under the particular circumstances of this case. *See id.* at 275-76.

But in this case, the holding that Martell produced sufficient evidence to prove his due-diligence affirmative defense should not, and does not, end the inquiry. As the State argued in the trial court, as the trial court ruled, and as the State again argued in the Court of Appeals, even if the evidence showed a failure of strict compliance with the in-person-contact requirement of article 42A.109, Martell should be nevertheless estopped from relying on such failure of strict compliance where such strict compliance was a legal and factual impossibility due to Martell's request for, and receipt of, the benefit of being allowed to reside and

work outside of the jurisdictional reach and authority of local probation and law-enforcement officers.

Critical here is the distinction between: (1) a ruling that purports to disregard, or create a judicial exception to, a legislatively mandated requirement (such as the attempt-at-in-person-contact requirement of article 42A.109); and (2) a ruling that a party is estopped from relying on any such legislatively mandated requirement. *See Prystash v. State*, 3 S.W.3d 522, 530-31 (Tex.Crim.App. 1999)(noting the distinction between a ruling authorizing a court and the parties to disregard legislatively mandated requirements under a theory of waiver and a ruling based on a theory of estoppel), *cert. denied*, 529 U.S. 1102 (2000). And as this Court has recognized, even if such legislatively mandated requirements can not be disregarded or waived, properly applied rules of estoppel may nevertheless bar relief from a violation or failure to satisfy such absolute requirement or preclude a party's reliance on such legislatively mandated requirement. *See Colone v. State*, 573 S.W.3d 249, 265 (Tex.Crim.App. 2019)("Rules of estoppel will bar relief even for a trial court ruling that violates a mandatory provision in a statute[] and may even bar relief on what would otherwise be an absolute requirement.[]")(internal footnotes and citations omitted); *Saldano v. State*, 70 S.W.3d 873, 888 (Tex.Crim.App. 2002)("We have held that a party may be

estopped from relying on an absolute requirement.”).

Thus, while the Court of Appeals held in this case that it could not disregard, or create a judicial exception to, the attempt-at-in-person-contact requirement of article 42A.109, *see Martell v. State*, 615 S.W.3d at 275-76, which holding the State does not challenge in these PDR proceedings, it did not address the State’s separate and distinct argument that Martell should nevertheless be estopped from relying on that statutory requirement in proving his due-diligence affirmative defense. Because this separate-and-distinct theory and issue of equitable estoppel provides an alternative basis for upholding the trial court’s ruling, it was and is an issue whose resolution is necessary to final disposition of this appeal. *See* TEX. R. APP. P. 47.1; *State v. Bernard*, 512 S.W.3d at 352 (holding that where the court of appeals addressed and rejected only one of the State’s two arguments in support of the lawfulness of a traffic stop, the court of appeals erred and failed to comply with rule 47.1, which requires the court of appeals to address every issue raised therein that is necessary to final disposition of the appeal).

Simply, Martell asked the trial court for permission to reside and work in Mexico during the period of his deferred-adjudication community supervision, and the trial court granted that request. The inescapable result of Martell asking for

and voluntarily accepting that benefit from the trial court was the jurisdictional inability of any local officer to physically go to Martell's authorized place of residence or work to attempt in-person contact with him once he (Martell) stopped reporting to his probation officer. And as the trial court properly reasoned and ruled, Martell should therefore be estopped from using that voluntarily accepted benefit of being allowed to reside and work in Mexico as an offensive sword (or defensive shield) in the revocation/adjudication litigation of the due-diligence issue.⁴

⁴ The theory of estoppel, which is based on equitable notions of justice, is a flexible doctrine that takes many forms, including: (1) "estoppel by judgment," whereby a defendant who voluntarily accepts the benefits of a judicial order (here, the trial court's terms and conditions of community supervision granting Martell's request to reside and work in Mexico) is thereafter estopped from rejecting any burdensome consequences of the order; and (2) "estoppel by contract," whereby a defendant who accepts the benefits of a contract (here, the community-supervision contract with the trial court) is thereafter estopped from questioning the effect of such contract. See *Deen v. State*, 509 S.W.3d 345, 348-49 (Tex.Crim.App. 2017); *Rhodes v. State*, 240 S.W.3d 882, 891 (Tex.Crim.App. 2007). These types of equitable estoppel apply to nullify any kind of systemic breakdown (except for a lack of subject-matter jurisdiction) in the community-supervision context. See *Gutierrez v. State*, 380 S.W.3d 167, 177 (Tex.Crim.App. 2012). In this case, there is no question that Martell voluntarily accepted the benefits of the terms and conditions of his probation allowing him to reside and work in Mexico, as he specifically requested that benefit. *Contra Deen v. State*, 509 S.W.3d at 350, and *Gutierrez v. State*, 380 S.W.3d at 179 (cases where this Court noted that, contrary to the situation presented in this case, the terms and conditions of community supervision are typically not a product of negotiation, and a criminal defendant ordinarily has no say in the trial court's imposition of those terms and conditions, such that the defendant's acceptance of those terms, conditions, or any "benefits" therein, is not truly voluntary in the context of an estoppel-by-judgment analysis). Moreover, the condition of Martell's community-supervision contract allowing him to reside and work in Mexico is not otherwise unenforceable on public-policy grounds. *Contra Gutierrez v. State*, 380 S.W.3d at 177 (where this Court held that the theory of estoppel-by-contract does not apply when the relevant term of the community-supervision contract is unenforceable on grounds of public policy).

Based on all the foregoing, because the Court of Appeals wholly failed to address the properly raised estoppel issue or answer the question of whether Martell is or should be estopped from successfully raising and proving his due-diligence affirmative defense when the State's strict compliance with article 42A.109 was rendered legally and factually impossible by Martell's request for, and voluntary acceptance of, permission to reside and work in Mexico during the period of his community supervision, this Court should vacate the judgment of the Court of Appeals and remand the case to the Court of Appeals to address the applicability *vel non* of this equitable estoppel issue. *See State v. Bernard*, 512 S.W.3d at 352 (where this Court vacated the judgment of the court of appeals and remanded the case to the court of appeals to address the State's second argument in support of the lawfulness of the traffic stop).

PRAYER

WHEREFORE, the State prays that this Court vacate the judgment of the Court of Appeals and remand the case to the Court of Appeals to address the estoppel issue raised therein by the State.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 17, contains 3,935 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Tom A. Darnold

TOM A. DARNOLD

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on April 8, 2021, a copy of the foregoing brief was sent by e-mail by utilizing the E-serve system to appellant's attorneys: Todd Morten, at tmorten@epcounty.com; Maya I. Quevedo Stevenson, at mquevedo@epcounty.com; and Octavio A. Dominguez, at odominguez@epcounty.com.

(2) The undersigned also does hereby certify that on April 8, 2021, a copy of the foregoing brief was sent by e-mail by utilizing the E-serve system to the State Prosecuting Attorney at information@SPA.texas.gov.

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